

MONETARY PROMINENCE OVER JUDICIAL INDEPENDENCE: THE  
CONFLUENCE OF EXTRA-CONSTITUENT CONTRIBUTIONS AND  
MAJORITARIANISM IN STATE JUDICIAL ELECTIONS

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## **Abstract**

My initial research question sought to understand the influence of out-of-state contributions on state judicial elections so as to determine if judicial elections were fulfilling their majoritarian intent. The idea behind infusing majoritarianism with judicial elections is to ensure that the judiciary is reflective of the people it governs. The question then becomes, if judicial campaign contributions come from out-of-state, do these extra-constituent contributions influence the judiciary and skew adjudications in a manner that is discordant with the ideology and inclinations of the judiciary's electorate. Unfortunately, this line of inquiry quickly ended as I was unable to ascertain all of the donors in a sampling of state judicial elections due to the presence of dark money, which is rapidly growing in state judicial elections.

Using existing research, I examine if judges consider electoral considerations during adjudication, if securing campaign contributions are an important electoral consideration, and if so, are judges likely to consider campaign donors when adjudicating a case. While inconclusive, there is strong evidence to indicate that judges do consider sources of campaign funds during adjudication.

Ultimately, I conclude that additional campaign finance reform is needed to eliminate the presence of untraceable contributions in state judicial elections. Current Supreme Court precedent provides a strong basis for the legality of stronger campaign finance regulations on judicial elections even though similar laws would unlikely be upheld for legislative or executive elections.

Both advocates and opponents of judicial elections have a vested interest in knowing what influence money is having on the judiciary. By enacting additional campaign finance reforms on state judicial elections, states can verify that the judiciary's performance reflects the majoritarian intent behind judicial elections. Ultimately, without new campaign finance regulations mandating additional disclosure of contributions, the full impact of money in state judicial elections will remain unknown. This absence of data prevents a complete understanding of whether state judicial elections are having a positive or detrimental impact on the governance of their respective states.

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# Ch. 1 The Conundrum Of Purpose

*“Under some [state] constitutions the judges are elected and subject to frequent reelection. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates’ independence, not judicial power only but the democratic public itself has been attacked.” – Alexis de Tocqueville, Democracy In America, 1835*

## Introduction

At the inception of this paper, I sought to determine the influence of out-of-state money on state judicial elections.<sup>1</sup> The driving premise behind this inquiry was to determine if judicial elections were fulfilling their majoritarian intent. The idea behind infusing majoritarianism with judicial elections is to ensure that the judiciary is reflective of the people it impacts. The question for me then became, if judicial campaign contributions come from out-of-state, do these extra-constituent contributions influence the judiciary and skew adjudications in a manner that is discordant with the ideology and inclinations of the judiciary’s electorate?

I was unsuccessful in my endeavor to resolve this question. Independent expenditure groups, or super PACs, and 501(c)4 groups are playing an increasingly large role in financing judicial elections. These groups can accept contributions from corporations, unions, associations and individuals. These

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<sup>1</sup> Please note, most studies of state judiciaries only examine a state’s supreme court and/or appellate courts. Consequently, the whole state would be its constituency. Thus an out-of-state contribution would be an extra-constituent contribution. However, state judiciaries are also often made up of district courts that encompass smaller portions of a state. These judges are also elected in some states. As such, an intrastate contribution could still be an extra-constituent contribution. However, due to the prominence of academic literature that focuses on a state’s higher courts, both out-of-state contributions and extra-constituent contributions will be used interchangeable throughout this paper.

contributing groups, or the “donor’s donors,” are often not required to disclose their sources of income or contributions. Consequently, on the independent expenditure group’s financial disclosure forms, the disclosures simply state the name of the contributing organization and not the true original source of the money. The original source(s), whether an individual or special interest group, is never actually revealed and so it is not known whether that money even derives from within a judiciary’s constituency or not.

As a result of these factors, my initial attempts at researching the original sources of contributions used by groups financing judicial elections were quickly stymied. Accordingly, this prevented any methodical and empirical study of the influence of out-of-state contributions to judicial elections and what impact it may have on the performance of an elected judge. It is this inability to determine, measure, and study the source of judicial campaign contributions, let alone their influence, that guides this theoretically based examination of state judicial elections.

Ultimately, I conclude that additional campaign finance reform is needed to eliminate the presence of untraceable contributions in state judicial elections. Both advocates and opponents of judicial elections have a vested interest in knowing what influence money is having on the judiciary. However, vast sums of untraceable money are being poured into judicial elections and it is obscuring any attempts to accurately measure what influence the source of money has on the behavior of the court. By enacting additional campaign finance reforms on state judicial elections, states can verify the judiciary’s performance reflects the majoritarian intent behind judicial elections. The ultimate intent of this paper is

that without additional campaign finance regulation mandating additional disclosure of contributions, the full impact of money in state judicial elections is unknown, let alone whether extra-constituent contributions have a positive or negative impact.

This paper does not seek to resolve the broader issue of whether judicial elections are an overall positive or negative practice, which is a topic that has been studied and written about at length for decades without resolution, but rather seeks to address a derivative issue, or rather a byproduct of the practice of judicial elections, one which has an immediate and ongoing impact on the integrity of the judiciary; and a legislative resolution of which is much more likely to be forthcoming than a sweeping overhaul of state judicial elections. In doing so, the paper will identify a policy proposal that if implemented would increase transparency and accountability in judicial elections as currently practiced as well as inform the broader conversation about the merits of judicial elections. The disclosure sought by the policy proposal would be two fold, disclosing the sources of judicial campaign contributions and disclosing additional information about the degree to which judicial elections are fulfilling their majoritarian intent.<sup>2</sup>

This paper is split into three chapters. The first chapter of the paper explores the underlying issues and themes behind majoritarianism and the judiciary and why they present an inherent conflict of purpose. Understanding the unstable platform on which judicial elections occur helps to contextualize the issues discussed in the in the second chapter of the paper. Additionally, the issues

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<sup>2</sup> The extent to which judges should fulfill majoritarian intent is an issue that will be explored at length further on in this paper.

explored in the second chapter of the paper can also feedback and further the understanding of the broader issues discussed in the first chapter.

The second chapter moves beyond the theoretical discussion of judicial elections and examines how state judicial campaigns and elections are conducted, the impact judicial elections have on judicial behavior, and why the judiciary is especially susceptible to the negative consequences of the increase of money in judicial elections. Specifically, the second portion of the paper will examine how the rise of spending in elections combined with out-of-state contributions has the potential to nullify the majoritarian benefit judicial elections, and by extension, the primary justification for judicial elections. Thereby leaving in place a controversial practice with inherent vulnerabilities, but now one that is absent of its intended positive benefits.

The third chapter of the paper will propose appropriate campaign finance reform to ameliorate the issues addressed in the second chapter while also furthering the discourse of the issues addressed in the first chapter. As the initial inquiry to study the influence of extra-constituent contributions to state judicial elections on judicial behavior was stymied by the inability to compile a comprehensive list of original donors, the apparent reform would be for the creation of additional disclosure requirements in relation to state judicial elections. However, as discussed later on, any such legislation would run contrary to the general trend of courts striking down campaign finance regulations. As such, before a policy proposal can be explored in-depth, a basis must be made as to why judicial elections are fundamentally different from legislative and



executive elections and as a result recent court rulings should not be applicable to judicial elections.

To note, while the original question was limited to examining out-of-state donors, the result of the proposed disclosure regulations is also applicable to the broader issue of whether contributions to judicial elections influence judicial adjudication in a manner that is favorable to the contributor, independent of the constituent status of the donor. Unlike extra-constituent contributions, there is already existing literature, although inconclusive, that examines the impact of campaign contributions on judicial behavior, but this line of inquiry is also limited to only the donors that have been publically disclosed. As those inclined to leverage their contributions to gain preferential treatment by the court, or otherwise engage in some other type of controversial behavior, would have a vested interest in making the contribution in a manner that prevents disclosure of the source the absence of these donors is glaring and presents a major flaw with existing data. Additionally, whether the contribution originates in-state or out-of-state, if it can be demonstrated that judicial contributions influence judicial behavior in favor of the donor, an incentive is created for the court to adjudicate in a manner that does not align with the majoritarian intent of judicial elections. This then creates another avenue whereby the main justification for judicial elections is nullified. While the desire of the non-constituent contributor may not always be incongruent with the will of the people, it should not be within

the capability of a contributor to dictate whether majority will is reflected by the judiciary.<sup>3</sup>

### **Background: The Inherent Tension In State Judicial Elections**

In modern political discourse, there has been a constant drumbeat of criticism towards judicial supremacy and “activist judges.” The basis for the criticism of judicial supremacy stems from judicial review and the corresponding ability of an unelected judge to override legislation passed by elected representatives. This conflict between judicial review and majoritarian will has been coined the “counter-majoritarian difficulty.”<sup>4</sup> As a result of the counter-majoritarian difficulty, amongst some political groups there exists a large concern about the judiciary and its potential to impede the will of the people. While this concern is not without legitimacy, this broad narrative of judiciary supremacy does not reflect the fact that a majority of legal cases in America are decided by judges who are subject to election.<sup>5</sup>

Each state is charged with establishing its own judicial institutions, including the method of judicial selection.<sup>6</sup> In the United States currently, there exists a myriad of methods that states have established for judicial selection.<sup>7</sup> There is an electoral component to judicial selection in 39 states – 78% of all U.S.

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<sup>3</sup> This premise assumes that a judge considers electoral factors during adjudication and that contributions are one such factor, which will be explored later in the paper.

<sup>4</sup> Alexander M. Bickel, “The Least Dangerous Branch: The Supreme Court as the Bar of Politics 16,” (1962); for examining the history of the issue and coining the term counter-majoritarian see, Barry Friedman, “The History of the Countermajoritarian Difficulty, Part One: The Road To Judicial Supremacy,” (1998)

<sup>5</sup> Steven Croley, “The Majoritarian Difficulty: Elective Judiciaries And The Rule Of Law,” *The University Of Chicago Law Review* vol. 62, no. 2, 1995, 690

<sup>6</sup> Christine Branstad, David Phillips, and Nathan Olson, “A Coin On The Tracks: Can Big Money and Judicial Politics Derail Judicial Impartiality Through Election Spending,” *Duke Law Review* 60, no. 3 (2012): 717

<sup>7</sup> Sandra Day O’Connor and Ruth McGregor, “Judicial Selection Principles: A Perspective,” 75, no. 4 (2011/12) 1742

states – meaning that a significant portion of the American people are affected by judicial elections.<sup>8</sup> Given that 78% of all U.S. states have an electoral component to their method of judicial selection and that 95% of judicial business is performed within state courts, state judicial elections have a prominent impact on state judiciaries, and by extension, the overall performance of the judiciary.<sup>9</sup>

The main methods of judicial selections are:

- **Merit selection:** The process by which judicial applicants are evaluated by a nominating commission, which then sends the names of the best qualified candidates to the governor. The governor appoints one of the nominees submitted by the commission.
- **Nonpartisan election:** An election in which a judicial candidate's party affiliation, if any, is not designated on the ballot. Multiple candidates may seek the same judicial position. Voters cast ballots for judicial candidates as they do for other public officials.
- **Partisan election:** An election in which candidates run for a judicial position with the official endorsement of a political party. The candidate's party affiliation is listed on the ballot. Multiple candidates may seek the same judicial position. Voters cast ballots for judicial candidates as they do for other public officials.
- **Gubernatorial appointment:** The process by which a judge is appointed by the governor (without a judicial nominating commission). The appointment may require confirmation by the legislature or an executive council.
- **Legislative appointment/election:** The process by which judges are nominated and appointed or elected by legislative vote only.
- **Note:** In most commission-based appointment systems, (gubernatorial, legislative, and merit selection) judges run unopposed in periodic retention elections, where voters are asked whether the judge should remain on the bench.<sup>10</sup>

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<sup>8</sup> Matthew Streb, "Judicial Elections and The Public Perception of the Courts," in *The Politics of Judicial Independence*, edited by Bruce Peabody (Baltimore: Johns Hopkins University Press, 2011) 149

<sup>9</sup> Branstad, Phillips, and Olson, "A Coin On the Tracks," 752 citing Randall T. Shepard, *Electing Judges and the Impact on Judicial Independence*

<sup>10</sup> *Identification of the main types of judicial selection and the associated definitions (quoted directly, or in some instances paraphrased for conciseness) are taken from "Judicial Selection In*

There is no other constitutional democracy in the world where elected judges have such a prominent and widespread role.<sup>11</sup> Yet before this singularity of the American system can be judged as beneficial or detrimental to the judiciary, the basis and intent of judicial elections must be examined. Only once the intentions and justifications behind judicial elections are understood can it be determined if judicial elections as practiced today are fulfilling their underlying basis and intent.

### **Majoritarianism**

The origins of judicial elections are rooted in majoritarianism and the democratic nature of the American government. The nexus between democracy and the American government is explored amply in academic literature and it will not be relitigated herein. The basis of this paper presupposes that the American government is intricately linked to democratic principles. While there is a legitimate basis to debate the extent of democracy's success in America, it is more readily accepted that classical liberal principles are incorporated into the institutions of the American system of government. For a precursory, and admittedly more symbolic than substantial, examination into the concept that it was intended for the people and their beliefs to play a role in the United States' government, one need only look at the first words of the first sentence of the U.S. Constitution – “We the people.”<sup>12</sup> It is from this constitution, and so this “we the

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The States,” Institute For The Advancement Of The American Legal System at the University Of Denver, (2008) p. 6 - 7

<sup>11</sup> Croley, “The Majoritarian Difficulty,” 691

<sup>12</sup> U.S. Const., preamble, *see* “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic],

people,” that the United States government continues to receive its authority and legitimacy.

Operating under this presupposition that democracy is a valued and underlying principle in the United States government, the value of majoritarianism in America can then be explored by establishing the nexus between democracy and majoritarianism. In Steven Croley’s *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, Croley, at some length, explores the link between democracy and majoritarianism in his efforts to study the potential dangers of judicial elections. In that this paper seeks to explore the same link, Croley’s argument linking democracy and majoritarianism is surmised briefly below so that more attention can be dedicated to building off of his conclusions, instead of redundant efforts to demonstrate what Croley has already sufficiently demonstrated.

Democracy, reduced to its most central principle, is rule by the people, in that it “affords all qualified members of the political community [an equal] voice in political decision making.”<sup>13</sup> With this understanding, majoritarianism becomes a complicit product of democracy since “once citizens of the polity are political equals – that is, once they have an equal voice in decision-making processes – it follows that policy alternatives attracting the most voices will prevail.”<sup>14</sup> Or rather less eloquently phrased, majoritarianism is the idea that, if all citizens have an equal voice in government, the position with the most

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promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

<sup>13</sup> Croley, “The Majoritarian Difficulty,” 702; *though as Croley discloses, he does* “not pretend to capture all of what entails with a single principle.”

<sup>14</sup> Croley, “The Majoritarian Difficulty,” 702

supporters will prevail. Provided this understanding, Croley defines the majoritarian principle of democracy as:

“The Majoritarian Principle of Democracy: All qualified members of the political community have an equal voice in political decisions made by the community, such that political decisions generating the support of a majority of the community’s members for that reason carry the day.”<sup>15</sup>

Therefore in practice, the majoritarian principle of democracy affords the largest bloc of the citizenry in agreement on a particular issue the right to determine the outcome for all of the citizenry on the issue at hand. This concept has been described in a more pejorative manner as a “tyranny of the majority.”<sup>16</sup>

This byproduct of an absolute democracy was not without observation by the American framers. Much rather, it was identified as a problem to be guarded against, as discussed most prominently in *The Federalist 10*. James Madison, calling the dominant voting block a “faction,” recognized the ability of individuals to unite out of common interest or passion in a manner that is “[adverse] to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>17</sup> Madison continues, “a pure democracy ... can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there

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<sup>15</sup>Croley, “The Majoritarian Difficulty,” 703

<sup>16</sup> Alexis De Tocqueville, “Democracy In America,” (1840), See Ch. 15: Unlimited Power Of The Majority In The United States, And Its Consequences, see “Tyranny Of The Majority. ... As majority taken collectively is only an individual, whose opinions, and frequently whose interests, are opposed to those of another individual, who is styled a minority. If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with one another; nor does their patience in the presence of obstacles increase with their strength.”

<sup>17</sup>James Madison, Federalist No. 10: “The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection.” *New York Daily Advertiser*, November 22, 1787.

is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.”

### **The Conflict Between Majoritarianism And Judicial Elections**

As Alexander Hamilton explained in the *Federalist* 78, the remedy for this potential problem of the majoritarian will infringing upon the rights of the minority was to be found within the judiciary. Hamilton writes, “It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>18</sup> In the following quote, note Hamilton’s emphasis on the necessity of an independent judiciary when he argues, that if limitations are to be placed on the legislature, there then has to exist an institution that can invalidate the legislature’s efforts to exceed the established limitations. Failure to have such an institution, Hamilton states, would render the limitations essentially impotent:

“The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”<sup>19</sup>

Hamilton also foresaw the issue of the counter-majoritarian difficulty with judicial review. Hamilton counters the criticisms of judicial review contained

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<sup>18</sup> Alexander Hamilton, “The Judiciary Department,” *Independent Journal*, June 14, 1788.

<sup>19</sup> *Id.*

within the counter-majoritarian difficulty by arguing that the court is not exercising judicial superiority by overturning legislation enacted by an elected body, but rather voiding what the legislature never had the authority to enact:

“Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. ... There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.”<sup>20</sup>

Hamilton further writes that the judiciary is not actually acting against the will of the people, but rather it is upholding the compacts that the people had previously made, amongst which is the supremacy of the Constitution. <sup>21</sup>

As Hamilton wrote when establishing the institutions of the federal government, the framers envisioned the judiciary as a bulwark between majoritarian dominance and individual rights. In this role the judiciary can ensure equitable protection of rights. While this may involve overturning legislation that is reflective of the will of the people, the invalidation was performed to respect a previous compact made between the people and its government, which includes constraints on the legislature and the supremacy of the constitution.

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<sup>20</sup> Id.

<sup>21</sup> Id. *See*, “Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”



However, this distinct disconnect between the electorate and the judiciary was not extended to the judicial institutions of most U.S. states. So while Hamilton may have been able to philosophically reconcile the seemingly contradictory nature of judicial review and majoritarianism, the situation is rather more muddled with state judiciaries. With state judicial elections, the delegation of duty between the legislature, designed to act as the people's representatives, and the judiciary, designed to ensure that the legislature does not act in violation of its charter or in violation of the rights of the individual, becomes blurred.

It is self-evident, due to the nature of elections, that by participating in elections judges must become cognizant of the Majoritarian Principle of Democracy. Or rather, by the very need to win elections judges must recognize electoral considerations.<sup>22</sup> However, the consideration of electoral factors by the judiciary seems contradictory to the traditional understanding of a judge. As the Supreme Court wrote, the principle of a neutral and independent judiciary “dates back at least eight centuries to Magna Carta, which proclaimed, ‘To no one will we sell, to no one will we refuse or delay, right or justice.’ The same concept underlies the common law judicial oath, which binds a judge to ‘do right to all manner of people . . . without fear or favour, affection or ill-will,’ and the oath that each of us took to ‘administer justice without respect to persons, and do equal right to the poor and to the rich.’”<sup>23</sup>

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<sup>22</sup> *While this conclusion logically follows from a theoretically viewpoint, a more in-depth analysis will be explored later in the paper to verify that judges do consider electoral factors.*

<sup>23</sup> *Williams-Yulee v. Florida Bar*, S. Ct. 575 U.S. \_\_\_\_ (2015), p. 9

Advocates of judicial elections argue though that “the democracy-respecting judge ought to draw upon public perceptions and the prevailing state political climate when resolving difficult disputes.”<sup>24</sup> Herein lies the problem though, the need to be responsive to majority opinion and serve as a check against the “tyranny of the majority” presents a conundrum of purpose. Even the Supreme Court has recognized the “fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.”<sup>25</sup>

While state judiciaries are not the only check against the “tyranny of the majority,” undermining the ability of the judiciary to perform this function could make it significantly more difficult for those outside of the majority to obtain corrective action should their rights be infringed. For a country that declared, “whenever any Form of Government becomes destructive to [an individual’s unalienable rights], it is the Right of the People to alter or to abolish it...,” an increased difficulty, or additional delay, in obtaining one’s restitution of rights should be a particular area of concern.<sup>26</sup>

### **The Case For Judicial Elections**

As previously noted, the United States is the only constitutional democracy with judicial elections. The failure of other countries to adopt this singularity of the American system of government may be pointed to by critics of judicial elections as proof of the institution’s shortcomings. However, it was actually the

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<sup>24</sup> Chris Bonneau and Melinda Hall, *In Defense of Judicial Elections* (New York: Routledge, 2009) 15

<sup>25</sup> *Chisom v. Roemer*, 501 US 380 (1991) p. 501

<sup>26</sup> U.S. Declaration of Independence, 1776

shortcomings of an unelected judiciary that birthed judicial elections in the United States, and the problems that necessitated the creation of judicial elections validate the merits of the institution.

A prominent jurist once remarked that “dissatisfaction with the administration of justice is as old as law.”<sup>27</sup> This maxim holds true for the United States since dissatisfaction of the American model of the judiciary is as old as the country itself. As debate swirled around the United States’ creation of a new government, numerous papers were published debating the various methods and structures that should compose the country’s new institutions. Those papers came to be known as the *Federalist Papers* and *Anti-Federalist Papers*. As opposed to James Madison in the *Federalist Papers*, Brutus, a pseudonym, argued in the *Anti-Federalists Papers* that the federal judicial system lacked any effective method of accountability and would be “exalted above all other power in the government, and subject to no control.”<sup>28</sup> Brutus further argued, “When great and extraordinary powers are vested in any man, or body of men” that may infringe upon the rights of the people, any of the empowered should be held “accountable to some superior for their conduct in office. — This responsibility should ultimately rest with the People.”<sup>29</sup>

Discussing constitutional interpretation, Brutus noted that the constitution, which derives its power from the people, is to be interpreted by the branch of government that is least accountable to the people. Brutus wrote that with the other branches of government lacking any effective method of imposing

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<sup>27</sup> Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice, Remarks at the American Bar Association, 8/29/1906

<sup>28</sup> Brutus, “The Power of the Judiciary,” *New-York Journal*, 3/20/1788

<sup>29</sup> *Id.*

accountability over the judiciary and the people having no remedy to prevent the encroachment of government through judicial precedent, there is no way left to control the judiciary “but with a high hand and an outstretched arm.”<sup>30</sup> Clearly, from the inception of the nation there was recognition of a lack of majoritarian check on the judiciary. Although opposed to elections of judges as a whole, Brutus does propose the introduction of a legislative component into the judiciary by creating an elected “supreme controlling power” to oversee the judiciary. Brutus argued that the overseeing body should be elected because the failure to elect the controlling power would be “repugnant to the principles of a free government.”<sup>31</sup> Brutus was not alone in this position. Thomas Jefferson argued that making judges “dependent on none but themselves” ran counter to the principle of “a government founded on the public will.”<sup>32</sup> While such an electoral component as advocated by Brutus has not been introduced into the federal judiciary, it would only be around 40 years later that the first state fully adopted an elected judiciary.<sup>33</sup>

Initially, the states selected judges mainly through legislative or gubernatorial appointments.<sup>34</sup> As populism became the zeitgeist of the Jacksonian era, electing judges gained support as an alternative to judicial appointments.<sup>35</sup> The support for judicial elections arose in response to the

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<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> *Williams-Yulee v. Florida Bar*, S. Ct. 575 U.S. \_\_\_\_ (2015), p. 21, citing “The Works of Thomas Jefferson” (P. Ford ed. 1905).

<sup>33</sup> *Mississippi became the first state to adopt a system where all judges were elected, doing so in 1832.* Sandra Day O'Connor, “Essentials and Expendables of the Missouri Plan,” 74 Mo. L. Rev. (2009), p. 5

<sup>34</sup> Branstad, Phillips, and Olson, “A Coin On the Tracks,” 717

<sup>35</sup> Id.

perception that appointing judges enabled the appointing body to “award judgeships based on party loyalty rather than on legal ability, judicial temperament, or fair mindedness.”<sup>36</sup> In response to the negative perceptions surrounding this method of judicial selection, in 1832 Mississippi adopted a method of judicial selection that relied entirely on elections, becoming the first state to do so. While judicial elections have received sustained scrutiny for their potential to create a biased judiciary, as it turns out, parallel criticism actually fathered judicial elections.

In the many evolutions of judicial selection in the United States, the unifying theme behind the various calls for an improved method was the failure of the judiciary to adequately reflect majoritarian characteristics or the qualities necessary for majoritarian governance.<sup>37</sup> The people’s frustration with the court system over its inability to adequately represent their beliefs speaks to the inherent conflict of a judiciary in a democracy – the aforementioned counter-majoritarian difficulty. Named by Alexander Bickel, the issue at the heart of counter-majoritarianism is that if “democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?”<sup>38</sup> For Bickel, a ruling by the court that struck down an act of the elected executive or legislature was not advancing the will of the people but actively opposing it.<sup>39</sup> In the public’s mindset, majoritarianism has become equivalent with the democratic process

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<sup>36</sup> Sandra Day O'Connor, “Essentials and Expendables of the Missouri Plan,” p. 5

<sup>37</sup> Melinda Hall, “The Controversy Over Electing Judges and Advocacy in Political Science,” Taylor & Francis, Ltd., p. 289

<sup>38</sup> Friedman, “The History of the Countermajoritarian Difficulty,” p. 335

<sup>39</sup> Alexander M. Bickel, *The Least Dangerous Branch*, 1962 16-17

and for “democracy simply to entail majority.”<sup>40</sup> The prominence of the counter-majoritarian difficulty is surmised by Erwin Chmerinsky, who in 1989 called it “the dominant paradigm of constitutional law and scholarship, a paradigm that emphasizes the democratic roots of the American polity and that characterizes judicial review as at odds with American democracy.”<sup>41</sup>

In the judiciary there is no status quo of absolute impartiality that is immediately compromised by the introduction of judicial elections. Justices have their own inherent biases and personal preferences, and whether intentional or not, justices can imprint these biases into the court’s ruling.<sup>42</sup> In appointive systems of judicial selection, there is no effective method to remove judges that rule in a manner reflective of their own personal preferences and contrary to public opinion or case law, unless the actions of the judge are so egregious as to merit impeachment. With the introductions of judicial elections, judges can more easily be held accountable. Therefore judicial elections can actually act as a deterrent against using the court to advance a personal preference.<sup>43</sup> As explained by Melinda Hall, “When public sentiment and the rule of law coincide, curbing the blatant display of judicial preferences is beneficial.”<sup>44</sup> When “pressures from electoral politics” can force judges to “abandon their own political preferences and act in accordance with the rule of law, courts are strengthened and democracy is enhanced.”<sup>45</sup> Further, with the premise that

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<sup>40</sup> Friedman, “The History of the Countermajoritarian Difficulty,” p. 345

<sup>41</sup> *Id.*, p. 335 *citing* Erwin Chemerinsky, The Supreme Court, 1988 Term-Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 71 (1989)

<sup>42</sup> Hall, “The Controversy Over Electing Judges,” p. 285

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, see p. 286

<sup>45</sup> *Id.*, see p. 285

judges have an inherent bias and that electoral factors can compel a judge to instead reflect the bias of a constituency, is it not more desirable in a democracy, though still not ideal, for the bias of the governed to supersede the bias of an individual?

A mantra has developed when discussing judicial elections that judicial independence equates to a freedom from elections and judicial elections equates to jeopardizing the integrity of the judiciary.<sup>46</sup> As the previous paragraph demonstrates though, judicial elections can help foster majoritarianism and enhance democracy while also helping to uphold the integrity of the judiciary. Judicial elections not only provide an avenue to hold judges accountable but also create “a recurring focal point with which to stimulate and structure constitutional deliberation.”<sup>47</sup>

Judicial supremacy can lead to citizen passivity in relation to the judiciary. The inability of citizens to have an “active and ongoing [popular] control over the interpretation and enforcement of constitutional law” helps breed this citizen passivity by denying the citizenry any meaningful input or connection to the judiciary.<sup>48</sup> This creates more room for judicial overreach and leaves only those that have a direct interest to remain involved. Judicial elections, however, help establish a connection between the constituency and the judiciary since judges are forced to appear at campaign stops throughout their district and the

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<sup>46</sup> Id., see p. 286

<sup>47</sup> David Pozen, “Judicial Elections as Popular Constitutionalism,” *Columbia Law Review*, vol. 110 no. 8, 8/2010, p. 2050

<sup>48</sup> Id. see p. 2058

constituents learn about the about the functions of the court.<sup>49</sup> As one judicial candidate noted, during a campaign stop Q&A, the first question he received was “what does the court of appeals do?”<sup>50</sup> The answer seemed obvious to someone who spent a lifetime in law, but not to this casual observer of the legal process.

Judicial elections provide the people an opportunity to participate in the legal process, demystify judges as “forbidding, black robed officials,” and most importantly in a representative democracy “they demonstrate that the courts serve the people in a community, and not just some antiquated legal text or esoteric professional code.”<sup>51</sup> Additionally, judicial elections can bring the judiciary closer to its constituency by hastening the alignment “between judicial outputs and communal preferences” since mechanisms for public influence in appointive methods of judicial selection are slow and weak, thereby casting the public out of the judicial process in all but the most important matters.<sup>52</sup> Further, judicial elections can legitimize the actions of the court since elections are one of the “central legitimating constitutional ideals” and repeatedly require the public’s consent.<sup>53</sup>

Having just overthrown the yoke of the English crown that possessed, and exercised, broad control over the judiciary in colonial America, the founding

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<sup>49</sup> Martin Siegel, “In Defense of Judicial Elections (Sort Of),” *American Bar Association’s Litigation*, vol. 36, no. 4, (Summer 2010), p. 25

<sup>50</sup> *Id.*

<sup>51</sup> *For quote on “black robed official, see Siegel, In Defense of Judicial Elections (Sort Of),” p. 25. For quote on courts serving the community, see David Pozen, “Judicial Elections as Popular Constitutionalism,” p. 2070*

<sup>52</sup> *For the hastening effect of judicial elections, see Pozen, “Judicial Elections as Popular Constitutionalism,” p. 2071. For the slow nature of controls in appointive systems, see Pozen, “Judicial Elections as Popular Constitutionalism,” p. 2055*

<sup>53</sup> *For elections being a central legitimating ideal, see Friedman, “The History of the Countermajoritarian Difficulty,” p. 345. For the repeated requirement of public consent, see Pozen, “Judicial Elections as Popular Constitutionalism,” p. 2069*



fathers prioritized the protection of judicial independence.<sup>54</sup> However, protections to ensure judicial independence can at the same time increase the independence of the judiciary from any form of accountability – be it to the electorate or to established law.<sup>55</sup>

From the survey of literature discussed in this section, it can be seen that the criticism of the judicial selection process tends to increase when the complaints surrounding judicial selection involve issues that negatively impact majoritarian involvement or the adequate exercise thereof. This can include the exclusion of the citizenry in judicial selection, the selection of judges beholden to legislatures or governors, and judicial selection that gives wide berth to the influence of other special interests. This has led to a number of methods throughout the United States that incorporate electoral components while also attempting to limit the impact of additional actors seeking to influence the judiciary, though not always successfully.

The issue of judicial elections presents a catch-22 for those seeking to solve the associated problems. Conducting judicial elections leads to the majoritarian difficulty, but offering no variation of a judicial election leads to the counter-majoritarian difficulty. The potential benefits of one system may outweigh its attached difficulty or the answer may lie in a hybrid of the two options which attempts to maximize the benefits of a judicial election while minimizing potential problems. To ensure states pursue and adopt the best method of judicial selection however, it is first necessary for policymakers to fully

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<sup>54</sup> Sandra Day O'Connor, "Essentials and Expendables of the Missouri Plan," p. 4

<sup>55</sup> Hall, "The Controversy Over Electing Judges," p. 286

understand all the consequences each method of selection may have. This means all the relevant information for each method of judicial selection needs to be disclosed so lawmakers and the public can make the most informed decision.

### **Case Study: The Conundrum Of Purpose In Iowa**

Nowhere has the conundrum of purpose present in judicial elections, and the problems it conceives, been more evident recently than in the matter of *Varnum v. Brien*.<sup>56</sup> The Iowa Supreme Court unanimously overturned the state's 1998 Defense of Marriage Act after six gay couples filed a lawsuit in 2006 because they had been denied marriage licenses. In the Iowa Supreme Court's 2009 opinion, authored over 200 years after the *Federalist Papers* were written, the Iowa justices rather conveniently address all of the issues from the *Federalist Papers* that were discussed previously in this paper and mirror the philosophy espoused by Hamilton regarding the role of the judiciary:

In this case, we must decide if our state statute limiting civil marriage to a union between a man and a woman violates the Iowa Constitution, as the district court ruled. ... A statute inconsistent with the Iowa Constitution must be declared void, even though it may be supported by strong and deep-seated traditional beliefs and popular opinion. ... It is also well established that courts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms. ... **The idea that courts, free from the political influences in the other two branches of government, are better suited to protect individual rights was recognized at the time our Iowa Constitution was formed.** ... Our responsibility, however, is to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time. ... While the constitution is the supreme law and cannot be altered by

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<sup>56</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)

the enactment of an ordinary statute, the power of the constitution flows from the people, and the people of Iowa retain the ultimate power to shape it over time. ... We are convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation. ... Consequently, the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.<sup>57</sup> [emphasis added]

After the case was decided, the ruling received widespread media attention and political opponents immediately vowed to fight the court's ruling.<sup>58</sup> By happenstance, the very next year three of the Iowa justices were scheduled to be on the ballot for a retention election. From 2000 to 2008, \$0 was spent on Iowa Supreme Court retention election campaigns. In the 2009-2010 election cycle, more than \$1 million was spent.<sup>59</sup> The Iowa Supreme Court justices did not form any campaign committees believing it would have "politicized and jeopardized the integrity of their judicial office."<sup>60</sup> Large political organizations, however, spent more than \$900,000 on the race.<sup>61</sup> Despite the court's reference in its

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<sup>57</sup> Id.

<sup>58</sup> For media attention see generally, Roy Schotland, "Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion" *Georgetown Law Court Review* 46 (2011) 119; for political opponents see, Burt Brandenburg and Matt Berg, "The New Storm of Money and Politics Around Judicial Retention Elections," *Drake Law Review* 60 no. 3 (2012) 707

<sup>59</sup> Christine Branstad, David Phillips, and Nathan Olson, "A Coin On The Tracks: Can Big Money and Judicial Politics Derail Judicial Impartiality Through Election Spending," *Duke Law Review* 60, no. 3 (2012): 741

<sup>60</sup> Brandenburg and Berg, The New Storm, p. 708, citing Sandhya Somashekhar, "Iowa Foes of Same-Sex Marriage Seek to Oust Judges Who Legalized It," *Washington Post*, 8/27/10

<sup>61</sup> Brandenburg and Berg, The New Storm, p. 708

opinion to being free from political influence, all three judges, appointed by Democratic and Republican governors, lost their election.<sup>62</sup>

In the instance of the 2010 Iowa Supreme Court retention elections, both supporters of increased judicial independence and supporters of judicial elections have a reason to believe that the case highlights the basis for their cause. Proponents for greater judicial independence can highlight that the court correctly performed its role by recognizing and upholding the rights of homosexuals, a minority community, at the expense of the majority opinion. Additionally, these supporters can reasonably argue that the election's outcome jeopardized the court's ability to perform its role as a protector of rights in the future, which they would argue demonstrates the need for greater judicial independence. Indeed, one law review noted that the "Iowa anti-retention movement was a threat aimed to chill the decision making of judges in the future—in Iowa, and across the country."<sup>63</sup> An article in *Time* magazine with the title "Iowa Vote Shows the Injustice of Electing Judges," stated that the election results "should send a shiver down the spine of anyone who cares about the American system of justice."<sup>64</sup>

Supporters of judicial elections can argue that system performed exactly as it was designed. The judiciary acted contrary to the desires of its constituency and the public used elections to hold the relevant actors accountable. Indeed, one supporter of judicial elections in Iowa said, "We have ended 2010 by sending a

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<sup>62</sup> For election results, see A.G. Salzberg, "Ouster Of Iowa Judges Send Signal To Bench," *The New York Times*, 11/3/10, For partisan identification of governors that appointed the judges, see Adam Cohen, "Iowa Vote Shows The Injustice Of Electing Judges," *Time*, 11/10/10

<sup>63</sup> Brandenburg and Berg, *The New Storm*, p. 712

<sup>64</sup> Adam Cohen, "Iowa Vote Shows The Injustice Of Electing Judges," *Time*, 11/10/10

strong message for freedom to the Iowa Supreme Court and to the entire nation that activist judges who seek to write their own law won't be tolerated any longer."<sup>65</sup> The aforementioned *Time* article about the outcome of the election said that, Opponents of gay marriage celebrated, confident that a miscarriage of justice had been corrected at the ballot box..."<sup>66</sup>

## Conclusion

As one law review article noted when discussing the subject of judicial elections, "like it or not, elected judges are here to stay. ... The public heartily approves of the practice: eighty percent of those polled favor filling judgeships through elections."<sup>67</sup> The popularity of judicial elections viewed in conjunction with the widespread institutionalization the practice already enjoys lends credence to this premise that judicial elections are not likely to be rolled back in the near future. Accepting this premise as a reality, whether this reality is congruent or incongruent with one's preferences, shifts the trajectory of the discourse from the appropriateness of judicial elections to instead examining the best methods for judicial elections.

This shift in perspective can be beneficial to public policy as this approach is likely to be more conducive in refocusing the issue to questions that can impact current policy development in the place of continuing to concentrate on an issue

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<sup>65</sup> Brandenburg and Berg, *The New Storm*, p. 712, *citing* Adam Skaggs, Et Al., "The New Politics Of Judicial Elections 2009- 10: How Special Interest 'Super Spenders' Threatened Impartial Justice And Emboldened Unprecedented Legislative Attacks On America's Court," (Charles Hall ed., 2011), p. 9

<sup>66</sup> *Supra*, see 30

<sup>67</sup> Amanda Frost and Stefanie, "Countering The Majoritarian Difficulty," *Virginia Law Review*, vol. 96 no. 4 (June 2010), p. 721 *citing* Kermit L. Hall, Judicial Independence and the Majoritarian Difficulty, *in* *The Judicial Branch* 60, p. 73

with entrenched and established interests, like that of supporting or opposing the nature of judicial elections. Adopting a pragmatic perspective, it is no longer a question of if one supports judicial elections, but rather how best to reform the elections to one's desired outcome. This clearly does not relegate the previously explored underlying tension into any degree of unimportance however, since it would logically follow that one's desired reforms would reflect the advancement of the desired broader policy goals.

There is a whole field of research and scores of academic literature focused exclusively on whether judicial elections are appropriate. The interests in this matter are well entrenched. To advance this debate in manner that can actually have an immediate impact on policy, it should be determined how successful judicial elections are at fulfilling their primary purpose of majoritarian accountability. So while the issues surmised in this chapter advance existing discourse little, it is necessary to address first so as to set the goal posts by which to measure the success of judicial elections.

The same underlying tension between majoritarianism and the neutral adjudication of the law that fuels the debate about the propriety of judicial elections is the same underlying tension that propels the driving inquiry of this paper. That is because the issues examined here within are a byproduct of judicial elections and the appropriateness of extra-constituent contributions to support judicial elections is the manifestation of the philosophical conflict of purpose in judicial elections into the policy arena with real world impacts on current events. As such, the exploration of out-of-state contributions and majoritarian intent, to

be conducted in the second chapter of this paper, will further illuminate the broader debate about judicial elections and move the debate forward.

Due to the conundrum of purpose created by the practice of judicial election, which creates an unstable foundation and uncertain purpose for the judiciary, if it is concluded that the elections are unable to fulfill the primary purpose of majoritarianism then the continuation of judicial elections should be seriously reevaluated.

## **Ch. 2 The Impact Of Elections On State Judiciaries**

### **The Role Of Money In Judicial Elections**

A fissure has developed between the intent of elections, which is to create majoritarian accountability and isolate the judiciary from legislative politics, and those working to influence judicial elections with money.<sup>68</sup> This is especially problematic as the judicial branch is the weakest of the three branches of government. “Justice O'Connor points out that while the executive and the legislative branches wield the power of the sword and purse, respectively, the courts wield the power of the quill. The judicial power lies in the force of reason and the willingness of others to listen to that reason. With the increase in judicial election spending, judicial accusations, and the influx of politics into the courtroom, the legitimacy of the judicial branch, which rests entirely on its promise to be fair and impartial, will erode in the court of public opinion.”<sup>69</sup> If the citizenry is presented with the promise of judicial accountability, but not that reality of it, the legitimacy of the institution becomes compromised; endangering the institution in its entirety.

Prior to the year 2000, the influence of money was not a primary area of concern in the study of state judicial elections. Studies on the methods of judicial selection focused on many of the same problems being discussed today, like low

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<sup>68</sup> Branstad, Phillips, and Olson, “A Coin On the Tracks,” 752

<sup>69</sup> Id., 729



voter turnout and how the different institutional structures impact court behavior, but mitigating the influence of donations was relatively absent.<sup>70</sup> Examinations of threats to judicial independence largely identified majoritarian considerations influencing judicial behavior or legislative bodies restricting judicial authority as the primary issues, but money was not flagged as a major threat to judicial independence.<sup>71</sup>

Money began to play an increasingly prominent role in judicial elections beginning early in the 2000s.<sup>72</sup> Between 1990 and 1999 \$83.3 million was spent on judicial elections.<sup>73</sup> Between 2000 to 2009, the amount spent on judicial elections rose to 206.9 million.<sup>74</sup> New state records were set for spending on state supreme court elections in 2007 and 2008.<sup>75</sup> In the 2009-2010 election cycle, \$2.8 million was spent on retention elections. Up until then, only \$2.2 million had been spent on retention elections that entire decade.<sup>76</sup> An analysis by the Brennan Center For Justice reported that judicial elections in 12 states involved

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<sup>70</sup> For institutions and behavior, see Paul Brace and Melinda Hall, "Studying Courts Comparatively: The View From The American States," *Political Research Quarterly* 48 no. 1 (1995): 12, For absence of money, see William Hall and Larry Aspin, "Distance from the Bench and Retention Voting Behavior: A Comparison of Trial Court And Appellate Court Retention Elections," *The Justice System Journal* 15 no. 3 (1992). For low turnout, see Stuart Nagel, "Comparing Elected and Appointed Judicial Systems," in *Sage Professional Papers in American Politics*, vol. 1, edited by Randall Ripley (Beverly Hills, Sage Publications, 1973) 17-20

<sup>71</sup> For majoritarian considerations, see Phillip Dubois, *From Ballot to Bench*, (Austin: University of Texas Press, 1980) 20-28. For legislative threats, see Irving Kaufman, "The Essence of Judicial Independence" *Columbia Law Review* 80 no. 4 (1980) 695-697

<sup>72</sup> Roy Schotland, "Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion" *Georgetown Law Court Review* 46 (2011) 119

<sup>73</sup> Burt Brandenburg and Matt Berg, "The New Storm of Money and Politics Around Judicial Retention Elections," *Drake Law Review* 60 no. 3 (2012) 704

<sup>74</sup> Branstad, Phillips, and Olson, "A Coin On the Tracks," 739

<sup>75</sup> Sandra Day O'Connor and Ruth McGregor, "Judicial Selection Principles: A Perspective," 75, no. 4 (2011/12) 1743

<sup>76</sup> Branstad, Phillips, and Olson, "A Coin On the Tracks," 740

spending of over \$1 million during the 2011 – 2012 election cycle.<sup>77</sup> In the 2011-2012 election cycle, the most expensive high-court elections were in four states where the judiciary was closely divided by judicial philosophy.<sup>78</sup> All this evidence illustrates a portrait of judicial elections becoming more infused with large campaign spending.

The increase in election spending has been marked by a few dominant groups responsible for a large portion of the money spent. Money has traditionally come from two main sources in judicial elections, business interests and lawyers, but since 2000 additional special interest groups have become a significantly larger source of contributions.<sup>79</sup> 38.7% of the money spent in 2009-2010 judicial elections came from just ten groups.<sup>80</sup> On state supreme court races alone, interest groups independently spent \$15.4 million in 2011- 12.<sup>81</sup> 97% of the contributions by the top 10 largest donors in the 2011- 2012 judicial elections went towards independent expenditures instead of direct contributions.<sup>82</sup>

### **Attempting To Measure Whether The Reality Of Judicial Elections Reflects The Majoritarian Intent Of Elections**

Starting with a 2004 election in Missouri, judicial elections have sometimes served as a vehicle to highlight divisive issues in an attempt to ‘turn

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<sup>77</sup> “The New Politics of Judicial Elections, 2011 – 2012,” The Brennan Center For Justice at New York University School Of Law, p. 5

<sup>78</sup> “The New Politics of Judicial Elections” The Brennan Center For, p. 5

<sup>79</sup> Deborah Goldberg, “Interest Group Participation In Judicial Elections,” in *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections*, edited by Matthew Streb (New York: New York University Press, 2007) 77-80

<sup>80</sup> Sandra Day O’Connor and Ruth McGregor, “Judicial Selection Principles” 1743

<sup>81</sup> “The New Politics of Judicial Elections” The Brennan Center For, p. vii

<sup>82</sup> “The New Politics of Judicial Elections” The Brennan Center For, p. 4

out the base' and increase voter turnout to advance non-judicial elections.<sup>83</sup> In such instances, judicial elections only served as a platform to advance non-judicial actors. The intent behind such campaign strategies does not appear to be the advancement of justice or ensuring the people's ideology is reflected in the state judiciary.

With such tactics being employed and the explosion of money in judicial elections by a relatively few independent groups there should be a parallel increase in the scrutiny of contributions to judicial elections. While there has been an increase in the study of judicial elections and the role of money as a whole, there has been little discourse on, or examination of, the impact out-of-state money has on elections and court adjudication. Understanding that the majoritarian principle of democracy links elections to the will of the people, it is then worthwhile to examine if the role of out-of-state money is reinforcing or damaging the majoritarian aspect of elections. As judicial elections are already a controversial event, if the elections are no longer ensuring the judiciary is reflective of its constituency, then it would become increasingly difficult to advocate for their continued existence after the main justification for judicial elections has been nullified.

As explored in chapter one, judicial elections by their nature exist in a precarious position where elected judges must serve two different and opposing goals. The introduction of an additional complicating factor, like a rapid influx of money serving as an accelerant to exacerbating preexisting conflicts by creating

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<sup>83</sup> Roy Schotland, "Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion" *Georgetown Law Court Review* 46 (2011) 119-120

an additional consideration, the appeasement of donors, for judges when adjudicating may destabilize the precarious balance of opposing goals eroding the capacity of a state judiciary to fulfill any of its now many goals.

Out-of-state campaign contributions pose a particularly interesting risk in that the donor is not a constituent of the court and there is no guarantee the contribution is being made to advance an interest of the constituency. One of the main arguments for judicial elections is that elections create judicial accountability and advance majoritarian principles. As two prominent proponents of judicial elections write, “The democracy-respecting judge ought to draw upon public perception.”<sup>84</sup>

However, as judges become more reliant on money to maintain their judgeship the importance of maintaining a strong donor base concurrently becomes more important.<sup>85</sup> When judges become reliant upon collecting large campaign contributions that maintain the judge’s own career and economic stability a dangerous conflict of interest is created. Judges must consider potentially impinging their own well-being to preserve the rights of an individual before the bench.

This conflict-of-interest, between judicial independence and judicial self-interest, is not a problem without precedent in America. On the contrary, it was one of the issues that helped conceive the United States. In the Declaration of Independence, all 13 states unanimously agreed that one of the acts of the King

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<sup>84</sup> Chris Bonneau and Melinda Hall, *In Defense of Judicial Elections* (New York: Routledge, 2009) 73-76

<sup>85</sup> Sandra Day O’Connor and Ruth McGregor, “Judicial Selection Principles” 1742-1743

that had caused “repeated injuries and usurpations” was that the King had “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” The judges, dependent upon the king for their salary and continuation of employment, would not be inclined to rule against him. It is now seen in the judiciary of the modern era, in order to be elected, judges are made dependent on financial donations. As money has risen in prominence and becomes increasingly necessary to be elected, judges are dependent on those who can provide financial resources for electioneering efforts. As seen, those who have the resources and are willing to make such contributions are largely from a small group of independent expenditure groups. This prompts the question, are judges representing their constituency or their financial benefactors?

Independent expenditure committees, often referred to as super PACs, “may raise unlimited sums of money from corporations, unions, associations and individuals, then spend unlimited sums to overtly advocate for or against political candidates.”<sup>86</sup> The groups must disclose their donor in reports regularly filed with the FEC, however, there are no limits or restrictions on the source of the contributions.<sup>87</sup> In this manner, it has become possible to disclose the source of the contribution without disclosing the actual origin of the money.

“A donor may give unlimited amounts to a nonprofit social welfare organization or a business association. These organizations, as well as labor unions, can in turn contribute funds to a Super PAC, which is allowed to receive unlimited contributions from tax-exempt

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<sup>86</sup> “Super PACs,” Center For Responsive Politics, Accessed on 12/1/14

<sup>87</sup> “What Is a PAC,” Center For Responsive Politics, Accessed on 12/1/14

organizations and other entities and use them to pay for their independent expenditures. A Super PAC is required to disclose only the amount and source of an organizational gift; it is not required to disclose the donors who provided the funding to the organization in the first place. In this way, intermediary groups can serve as vehicles for masking the actual donors funding campaign-related expenditures. They can function as pass-throughs to veil contributions from public view.”<sup>88</sup>

Additionally, after *Citizens United*, 501(c)4s have become another alternative route to disguise the originating source of a contribution.<sup>89</sup> 501(c)4s are tax exempt “social welfare” organizations that also must disclose their donors, but like super PACs can become a vehicle to shield the original source of the money.<sup>90</sup>

Using these types of financial arrangements, determining the original source of contributions becomes more akin to a shell game where the contribution is shuffled amongst multiple organizations. The Brennan Center, which has studied spending in state judicial elections every year since 2000, described attempting to identify the donors’ donors as such:

“Many of the top-spending special interest groups in 2011–12 shrouded their agendas and donor lists in secrecy. Names like the ‘Greater Wisconsin Committee’ and the ‘North Carolina Judicial Coalition’ leave ordinary citizens hard-pressed to identify spenders’ ideological or political agendas. Efforts to delve deeper by looking into the ‘donors’ donors’ result in varying degrees of additional clarity. In many cases, reviewing donor lists is like peeling back the layers of an onion, as the next level of contributors contains names of more umbrella groups. In other cases, attempting to go deeper leads to a dead end, as weak state disclosure laws and provisions of the federal tax code allow donors to avoid scrutiny.”<sup>91</sup>

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<sup>88</sup> Anthony Corrado, “Hiding In Plain Sight: The Problem of Transparency in Political Finance,” Committee For Economic Development, (July 2013), p. 7

<sup>89</sup> Ganesh Sitaraman, Contracting Around *Citizens United*,” *Columbia Law Review*, vol. 114 no. 3, (April 2014) p. 763

<sup>90</sup> Anthony Corrado, “Hiding In Plain Sight: The Problem of Transparency in Political Finance,” Committee For Economic Development, (July 2013), p. 4

<sup>91</sup> “The New Politics of Judicial Elections” The Brennan Center For Justice at New York University School Of Law, p. 12

In this manner, it becomes effectively impractical to catalogue all the original donors in a judicial election. Without knowing the source of contributions it then becomes a feat of impossibility to empirically determine whether the court's behavior is modified to benefit the court's out-of-state donors. As a result, it cannot be verified or disproven through this method if out-of-state contributions have a direct causation on judicial adjudication that is not reflective of majoritarian intent. As such, the proponent of judicial elections should be as equally concerned as the opponents by the influx of undisclosed money because the proponents lack the evidence to verify that judicial elections are fulfilling their intended majoritarian intent.

### **Legislative v. Judiciary: Why The Problems Of Money In Elections Are Amplified In Judicial Elections**

The increasing prominence of money in elections and the skilled use of loopholes in campaign finance regulations is not a problem isolated to the judiciary. Legislative races have frequently been the target of criticism regarding money in elections, especially in a post *Citizens United* world.<sup>92</sup> And many of the problems associated with money in elections that were addressed in the second portion of this paper are shared concerns in legislative elections as well. However, there are institutional consequences that are unique to the judiciary, which is why campaign finance regulation in judicial elections deserves special attention and why an individual's standard opinions on campaign finance

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<sup>92</sup> Sean McMahon, "Deregulate But Still Disclose?: Disclosure Requirements For Ballot Question Advocacy After 'Citizens United v. FEC' and 'DOE v. Reed,'" *Columbia Law Review*, vol. 113 no. 3 (April 2013) p. 733-735

regulation should not by default be transferred to judicial elections without additional reflection.

The most apparent unique conflict would be the intent of the institution. Operating under the premise of the majoritarian principle of democracy, an election should reflect the opinion of the dominant group. In regards to the legislative branch, at a basic level, this reflection of the majority would seem proper as the legislature is supposed to “have an immediate dependence on, and an intimate sympathy, the people,” notwithstanding the complexities of the restrictions placed upon the legislative branch.<sup>93</sup> Representing the will of the people is not foremost function of the judiciary branch though, as explored in the first part of this paper. It is on this conundrum of purpose, the need to be responsive to majority opinion and serve as a check against the “tyranny of the majority,” that the unstable foundation of judicial elections is built upon. All the standard controversies associated with money in elections are amplified because it creates the possibility of distracting the judiciary from its primary function as well as weakening majoritarian accountability.

Another factor unique to the judicial branch is that the judiciary is considered the weakest of the three branches in terms of exercising its authority. The legislative branch has the power of the purse, the executive branch has the power of the sword, but the judicial branch only has the power of wisdom; it is thus reliant upon voluntary compliance of its decisions by the public and other

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<sup>93</sup> James Madison, “The House of Representatives, *New York Packet*, 2/8/1788



branches of government.<sup>94</sup> A tenuous power whose limits have been exposed by President Andrew Jackson's famous decision to ignore the Supreme Court's ruling in *Worcester v. Georgia* and then taunt Chief Justice Marshall about it.<sup>95</sup> Consequently, the judicial branch has had to strategically work throughout its existence to build institutional legitimacy and a decline in public support can erode the judiciary's credibility threatening the judiciary's ability to adjudicate unpopular, yet constitutionally accurate, opinions.<sup>96</sup> As such, to preserve the institution of the judiciary extra assurances must be taken to ensure that its reputation is not impugned without just cause.

Perception of corruption, by the very nature of perception, is rooted in whether an individual believes there is corruption and not whether corruption actually exists. Consequently, the public's opinion that money in the judiciary causes corruption can be just as damaging, in terms of institutional legitimacy, as whether money actually causes corruption. As the Supreme Court itself has recognized, a court's "authority depends in large measure on the public's willingness to respect and follow its decisions. Public perception of judicial integrity is accordingly 'a state interest of the highest order.'" <sup>97</sup> Or, as phrased by Justice Frankfurter, "justice must satisfy the appearance of justice."<sup>98</sup>

A survey of multiple polls indicates that 67% to 90% of the public, depending on the wording of the poll, are concerned that contributions negatively

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<sup>94</sup> Shira Goodman, "The Danger Inherent the Public Perception that Justice is for Sale" 818-819

<sup>95</sup> Stephen Breyer, *Making Our Democracy Work: A Judge's View* (New York: Vintage Books, 2010) 22-31

<sup>96</sup> *Id.*, 215-220

<sup>97</sup> *Williams-Yulee v. Florida Bar*, S. Ct. 575 U.S. \_\_\_\_ (2015)

<sup>98</sup> *Offutt v. United States*, 348 U. S. 11, 14 (1954), p. 348

impact court decisions.<sup>99</sup> Judicial elections are often associated with having a number of harmful effects on perceptions of the court. Out of negative ads, judicial position taking and campaign contributions, it is campaign contributions that has the largest negative impact on the public's perception of the court's legitimacy.<sup>100</sup> It is when judges are perceived as self-interested in their pursuit of contributions that the public finds it most objectionable and has the biggest negative impact on the public's perception of the court.<sup>101</sup> The damaging effect money has on the judiciary is evidenced by the fact that individuals in states that elect judges have a lower approval rating of the judiciary than states with other methods of judicial selection.<sup>102</sup> Individuals in states with partisan judicial elections, the type of judicial selection where the most money is spent, are the most inclined to have an unfavorable view of courts and agree judges are just politicians in robes.<sup>103</sup>

While it can be perceived that money in judicial elections is damaging the legitimacy of the institution, to further determine how the problems of money in elections are amplified in judicial elections it becomes helpful to determine if electoral considerations actually have any effect on judicial behavior. If it can be demonstrated that judges do consider electoral factors in the adjudication of a case, then contributions, being a necessary resource in an election, would be one such factor judges would be likely to consider. By the same logic, the consideration of contributions viewed in conjunction with the growing

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<sup>99</sup> Shira Goodman, "The Danger Inherent the Public Perception that Justice is for Sale" 810

<sup>100</sup> James Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: University of Chicago Press, 2012), 68-69

<sup>101</sup> James Gibson, "Challenges to the Impartiality of State Supreme Courts" 69

<sup>102</sup> Shira Goodman, "The Danger Inherent the Public Perception that Justice is for Sale" 808

<sup>103</sup> Matthew Streb, "Judicial Elections and The Public Perception of the Courts," 158-161

importance of money would suggest that the contributors would also be a consideration of growing importance. This would mean that the interests of donors would have a growing role in the adjudication of a case as opposed to the judiciary's role as a neutral arbitrator.

Evidence strongly indicates that judges do consider electoral factors when presiding over a case. Voters are more likely to negatively react to a sentence of the court that under punishes an individual than a sentence that is overly harsh--judges realize this when deciding a case.<sup>104</sup> One study that examined sentencing in Pennsylvania found that sentences become significantly longer the closer the verdict is to the judge's next election.<sup>105</sup> Judges are 15% more likely to give the death sentence to criminal defendants during an election year.<sup>106</sup> Evidence also suggests that judges consider the ideology of their electorate. Judges in Republican districts tend to decide cases in ways that mirror Republican policies and judges in Democratic districts do the same for Democratic policies. Judges that identify as conservative vote more liberal in liberal areas and vice versa for liberal judges in conservative areas. Interestingly, this behavior is not found in judges that are not seeking reelection.<sup>107</sup> Judges in partisan elections already have a perceived ideology by the public and so are not as easily defined by a couple high salience cases. However, judges in retention or non-partisan elections are more susceptible to being easily defined and their votes tend to

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<sup>104</sup> Gregory Huber and Stanford Gordon, "Accountability and Coercion: Is Justice Blind When It Runs for Office?" *American Journal of Political Science*, 48 no. 2 (2004): 249-250

<sup>105</sup> Gregory Huber and Stanford Gordon, "Accountability and Coercion: Is Justice Blind When It Runs for Office?" 261-262

<sup>106</sup> Deborah Goldberg, "Interest Group Participation In Judicial Elections," 76

<sup>107</sup> Joanna Shepard, "The Influence of Judges' Politics on Voting," *The Journal of Legal Studies* 38 no. 1 (2009): 188-194

reflect their electorate's opinion much more so than judges in partisan elections.<sup>108</sup>

Additionally, judges consider voter and donor potential when making court decisions. Judges that are elected tend to side with in-state parties more frequently than out of state litigants because in-state parties can vote.<sup>109</sup> <sup>110</sup> One study found evidence indicating that donors tend to win in court more frequently than non-donors.<sup>111</sup> While not definitive, evidence suggests that businesses receive favorable treatment in partisan races - the most expensive type of election. This trend is not found in appointed or nonpartisan elected judges. This suggests that partisan elected judges are aware of the deeper resources businesses have available to spend for or against the judge.<sup>112</sup>

These studies strongly indicate that judges do consider electoral circumstances when making their decisions. As money is an important factor in judicial elections this evidence suggests that judges would be influenced by money when deciding a case. As previously noted, the role of money is increasing and so consequently the risk that judges place more importance on the consideration of money also increases.<sup>113</sup> While much of the literature is not definitive in their conclusions, the consistency of evidence across multiple studies

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<sup>108</sup> Brandice Canes-Wrone, Tom Clark, and Jee-Kwang Park, "Judicial Independence and Retention Elections," 225-228

<sup>109</sup> Deborah Goldberg, "Interest Group Participation In Judicial Elections," 76

<sup>110</sup> *This also presents an interesting problem. Out-of-state contributions may bias a judge to act against the will of the the electorate. However, if out-of-state parties in an action are at an inherently disadvantage then such contributions may actually be an equalizer in favor of fair adjudication, even though it comes at the expense of majoritarian accountability.*

<sup>111</sup> Shira Goodman, "The Danger Inherent the Public Perception that Justice is for Sale," *Drake Law Review* 60 no. 3 (2012): 813

<sup>112</sup> Michael LeRoy, "Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations," 95 no. 5 (2010): 1604-1605

<sup>113</sup> Deborah Goldberg, "Interest Group Participation In Judicial Elections," 74-75

is compelling. Provided this compelling evidence it can be reasonably concluded that judges do consider electoral factors and that the necessity for large contributions is one such factor. Further, it can be reasonably concluded that such considerations impact judicial decisions and that, the necessity for money in judicial elections being one such consideration, judges will modify their behavior to ensure the availability of large donors.

While this modification of judicial behavior can be perceived as acting against the interest of neutral and fair arbitration, it still has yet to be demonstrated that this will also encourage behavior that is incongruent with majoritarian will. There are, however, characteristics unique to judicial elections that exacerbates the influence of money in a manner that enables money, and by extension the donors, to have an outsized influence in judicial elections and plausibly raises the specter that judges will adjudicate to reflect the preferences of the donors. If the donors are out-of-state then, this raises the problem that the court is not acting in favor of an in-state interest or the electorate's preferences. Meaning that the judiciary can be incentivized to rule in a manner that is entirely not within in the interests of its constituency.

Judicial elections tend to be characterized by a low-information electorate and tend to have low-voter participation.<sup>114</sup> The lack of knowledge among the electorate means an interest group can more easily define a judge by just a few of their controversial cases. Incumbent judges are then much more susceptible to negative ads than candidates in a legislative race. Further, the low-voter turnout

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<sup>114</sup> Brandice Canes-Wrone, Tom Clark, and Jee-Kwang Park, "Judicial Independence and Retention Elections," *The Journal of Law, Economics, and Organization*, 28 no. 2 (2010) 225-228

means that it would only take a minor increase in a candidate's supporters or opponents to shift the outcome of an election. The result of these factors is that it is far easier in a judicial election to distort the perception of a judge and spend money to increase turnout by a sufficient enough margin to alter the election's outcome.

Taking these factors into consideration, contributions in judicial elections deserve a higher-level scrutiny than other elections. Large sums of cash from unknown sources are being infused into judicial elections at an increasing high level. These elections are particularly vulnerable to outside influence due to their low-information and low-voter participation nature. With the small turnout, it only takes a slight increase in partisan mobilization to sway the entire election in a manner that is not reflective of the majoritarian will. Meaning that, even though judicial elections threaten the public perception of the judiciary, and thereby undermine the institution as a whole, and threaten the rights of an individual, it is still possible that majoritarian preferences may not even be reflected in a judicial election.

### ***Caperton* And The Additional Danger Of Anonymous Donors In Judicial Election**

It is in this perilous state of judicial elections – in which judicial elections necessitate numerous potential harms to justice without the guarantee of majoritarian accountability– that the question of untraceable contributions should be considered.

The controversy in the matter of *Caperton v. A.T. Massey Coal Co.* begins after a jury in West Virginia delivered a \$50 million verdict against A.T. Massey

Coal Co. in 2002.<sup>115</sup> While the case was on appeal, the CEO of Massey became involved in the reelection of one of the judges on the assigned appellate court. The CEO created a non-profit corporation and spent \$3 million to support the challenger. The amount spent by the CEO was more than the total amount spent by all of the challenger's other donors and the challenger's own campaign. The challenger won the election and then refused to recuse himself when the *Caperton* matter reached the appellate court. The court overturned the \$50 million verdict on a 3-2 vote. The new judge was one of the deciding votes in overturning the ruling. In 2009, the Supreme Court heard the case and ruled that the conflict of interest was so extreme it violated the plaintiff's due process. In the majority opinion, the Court wrote, "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."<sup>116</sup> The Court goes on to write that "Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. ... Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to ...

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<sup>115</sup> *Caperton v. A.T. Massey Coal Co* 556 U.S. 868 (2009)

<sup>116</sup> *Caperton v. A.T. Massey Coal Co* 556 U.S. 868 (2009) *see* 2264

lead him not to hold the balance nice, clear and true.”<sup>117</sup> Which is to say that there need not be proof of actual corruption or bias by a judge to violate an individual’s due proceeds, but only that a contributor’s role in funding a campaign be significant enough so as to invite doubt that the average judge would be able to adjudicate objectively.

With Supreme Court precedent establishing that the size of a contribution from a single individual can create an apparent conflict of interest and violate the due process of a litigant, it follows that there is compelling interest in knowing the donors of judicial elections. Without this transparency, it remains possible for an individual to feed large amounts of contributions into a single judicial campaign. In such an occurrence, a potentially disadvantaged litigant would not be aware of the violation of due process and would not be in a position to appeal the matter, like the plaintiff in *Caperton* was able to. *Caperton* reveals an existing clear and present threat to both majoritarian accountability and the rights of an individual.

## **Conclusion**

Judicial elections operate in a precarious environment because of the conundrum of purpose their very existence causes. In a constitutional democracy, limits are placed on the will of the people and on the legislature to protect the rights of the individual. In order to nullify overreaching legislation, the judiciary is charged with judicial review. The power of judicial review to overrule the legislature and the long term limits that many state judges enjoy helped create a

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<sup>117</sup> *Caperton v. A.T. Massey Coal Co* 556 U.S. 868 (2009) see 885



narrative of a judicial oligarchy.<sup>118</sup> Judicial elections became a popular method to counterbalance this perceived judicial supremacy. However with judicial elections, the judiciary is subject to the same majority will that it is charged to guard against. As a result, the judiciary is placed in the precarious position of executing two contradictory responsibilities – protecting rights, even of the unpopular, while reflecting the popular will.

As a result of this conundrum of purpose, judicial elections are a contentious issue and the merits and disadvantages of such a system have been intimately reviewed in the annals of political science for decades. Despite the ongoing debate in academia, judicial elections remain popular and deeply entrenched in the institutions of a large majority of states. In an attempt to advance the debate, it becomes pragmatic to accept the continued existence of judicial elections in the immediate future. This allows the debate to instead focus on how the issues of the broader debate function within the mechanics of judicial elections. By focusing on the mechanics, one is more likely to influence policy development and thereby advance their own perspective on the broader issues.

One particularly salient issue, which has been increasing in prominence over the last decade, is the role of money in judicial elections. As money has grown in relevance in judicial elections it has received an increasing amount of scrutiny in academic literature, especially after three Iowa Supreme Court justices were voted out of office. Despite the copious amount of recent literature focusing on the rise of money in judicial elections, there has been little discourse on the influence of out-of-state money in state judicial elections.

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<sup>118</sup> Gilbert Roe, “Our Judicial Oligarchy,” New York : B.W. Huebsch, 1912

Since judicial elections are meant to create majoritarian accountability, out-of-state campaign contributions should be an area of particular concern. The evidence strongly indicates that judges consider electoral factors when presiding over a case. One factor that has dramatically increased in prominence is the need for large amounts of money in a judicial campaign. The main source of judicial campaign contributions tends to be large donations from advocacy organizations. If the campaign contributions are coming from out-of-state then there is the potential that the judge will be considering the preference of the donor and not any interest within the judge's constituency. Judicial elections are low-information and low-turnout elections and so are more easily manipulated by outside influence than legislative elections. These factors create the possibility that out-of-state contributions can influence elections, and alter the outcome, in a manner that is incongruent with the preferences of the electorate.

As such, it is a worthwhile endeavor to study the influence, if any, of out-of-state contributions. If out-of-state contributions are found to influence judicial performance in a manner that does not parallel the preference of the electorate then this should be a cause for concern amongst both the advocates and opponents of judicial elections. If however, no such correlation were established, those that support judicial elections and those that support unlimited spending in elections would have their position bolstered. Studying the influence of out-of-state contributions is therefore an effort that parties on both sides of the issue would have a vested interest in supporting.

As explored though, any serious effort to systematically catalogue the source of campaign contributions in judicial elections is impeded because of the

lax state of campaign finance laws in states and the prominent use of independent expenditure groups to shield the sources of money. Consequently, it is not possible to know the influence these campaign contributions are having on an electoral system that impacts the majority of court proceedings in the United States.

This problem of out-of-state judicial elections is further exacerbated by the issues demonstrated in the matter of Caperton. The Supreme Court has established it is possible for a large enough contribution by a single source to create an appearance of undue influence and violate the rights of the opposing litigant. Not only is this a major problem that independent expenditure groups are able to mask the true size and source of contributions, but when considering out-of-state contributions, it could actively harm the interest of a constituent for the benefit of an out-of-state donor.

All these issues give legitimate cause for concern that the main justification for judicial elections, majoritarian intent, could potentially be nullified. For these reasons, it is the conclusion of this chapter that there is a serious need for increased campaign finance regulations in state judicial elections that increases the transparency surrounding donors in state judicial elections. Additional regulations will improve efficacy and enable the influence of out-of-state contributions in state judicial elections to be seriously examined. Without it, millions of dollars will continue to flow unabated into the judiciary without any true understanding of the impact it is having or the influence it is buying.

## Ch. 3 Dark Money In Black Robes

*“At almost the same time last week that a Florida mailman was landing a gyrocopter in front of the U.S. Capitol to protest the influence of the wealthy on politics, New Jersey Gov. Chris Christie was getting pressed about the same topic at a town hall meeting in Londonderry, N.H. ‘I think what is corrupting in this potentially is we don’t knowski where the money is coming from,’ Christie (R) told Valerie Roman of Windham, N.H. The two moments, occurring 466 miles apart, crystallized how money in politics is unexpectedly a rising issue in the 2016 campaign”.*

– *The Washington Post*, 4/19/15

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### **Reforming Campaign Finance In State Judicial Elections**

Having been covered by the mainstream media, discussed by likely presidential candidates, and protested through over-the-top demonstrations – unlike a protesting gyrocopter pilot – money in politics has not been flying under the radar. Though the issue of money in politics has received widespread and frequent attention by members of the media and politicians, the rise of large individual donors and “dark money” is often addressed in the context of national elections, but these campaign finance issues extend to state judicial elections as well.

The influx of contributions in state judicial elections from an unknown source has no parallel on the federal level and so has not received the same level of national media coverage as has legislative or executive elections. On the federal level, there are no judicial elections, but instead judges are appointed to the

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<sup>119</sup> Matea Gold, “Big Money In Politics Emerges As A Rising Issue In 2016 Campaign,” *The Washington Post*, 4/19/15

bench, often for life tenures. The intent behind this method of judicial selection, as discussed previously, is to minimize the potential for judges to be inappropriately influenced by individuals that hold sway over the judge's livelihood.

This is not the case in many states. 39 states require judges to participate in some style of an election and these state judicial elections have not been exempt from the national trend of large donors that are willing to finance increasingly expensive elections. As judges are intended to be unbiased arbitrators, the reliance on large donors for a judge's livelihood raises the prospect for a potential conflict of interest; especially in the instance where a large donor has contributed to a judge that is presiding over a matter that the donor is a direct participant in or has a vested stake in.

As the Court has recognized contributions to issues surrounding an election are an expression of free speech – though that does not extend to direct contributions to political campaigns – it could be reasonably argued by many that restricting contributions solely on the unproven basis of a potential to corrupt would be an arbitrary and capricious limitation on an individual's rights.

The problem arises, however, that dark money prevents any comprehensive study to determine if large donors have any measurable influence on judicial behavior. Consequently, with the presence of dark money in state judicial elections it becomes impossible to know whether a presiding judge had benefited from election spending by one of the litigants involved in the matter or from a donor that has a significant interest in the outcome of the case. This should raise significant concerns about the ability of a judge to remain an

unbiased party during adjudication. However, in the interest of preserving liberties and preventing unnecessary burdens to the free exercise thereof, the method of addressing these concerns should be no more restrictive than necessary, if any restriction is necessary at all. With the presence of dark money however, the extent of parties with a vested interest in the outcome of a case that are also substantial contributors to the election efforts of a presiding judge is unknown. Consequently, the necessitated scope of any potential regulation to address the issue cannot be determined.

With the problem of judges potentially presiding over cases involving individuals that significantly benefited the judge's election efforts, the conflict of interest that such an occurrence would present, and the inability of the public and participants before the court to determine the extent of this issue there is a significant need for states to mandate additional disclosure and illuminate the infusion of dark money in state judicial elections.

### **Legal Basis For A Legislative Remedy**

Having recognized that there exists a substantial potential for impropriety and conflicts of interests to arise through the use of dark money in state judicial elections and that there continues to be significant gaps of knowledge about the extent of dark money in state judicial elections, it can be reasonably determined that a legislative remedy is necessitated to ameliorate these issues. However, there have been significant rollbacks in the campaign finance regulation framework by the Supreme Court.<sup>120</sup> The Court has repeatedly struck down existing campaign finance laws in favor of erring on the side of freedom of speech

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<sup>120</sup> David Magleby, "Financing The 2012 Election," Brookings Institution Press, 2014, p. 46

in relation to election contributions. Before designing what type of remedy is best suited to resolve the issue of dark money in judicial elections, it must first be determined whether there exists a legal basis for such a remedy. It is argued that due to the unique role of the judiciary, election regulations that may not satisfy legal requirements when applied to executive or legislative elections would be compliant and upheld when tested against any constitutional threshold because of the extra level of scrutiny protecting judicial elections merits. Fortunately, shortly before the completion of this paper, the Supreme Court ruled in *Williams-Yulee v. Florida Bar*, in which many of the issues addressed in this paper are examined. The Court's opinion supports many of the positions argued here.<sup>121</sup>

The increasing prominence of money in elections and the skilled use of loopholes in campaign finance regulations is not a problem isolated to the judiciary. Legislative races have frequently been the target of criticism regarding money in elections, especially in a post *Citizens United* world.<sup>122</sup> However, there are institutional consequences that are unique to the judiciary, which is why campaign finance regulation in judicial elections deserves special attention and why an individual's standard opinions on campaign finance regulation should not be immediately transferable to judicial elections without additional reflection.

In regards to the legislative branch, at a basic level, this reflection of the majority would seem proper as the legislature is supposed to "have an immediate dependence on, and an intimate sympathy, the people," notwithstanding the

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<sup>121</sup> *Infra*.

<sup>122</sup> Sean McMahon, "Deregulate But Still Disclose?: Disclosure Requirements For Ballot Question Advocacy After 'Citizens United v. FEC' and 'DOE v. Reed,'" *Columbia Law Review*, vol. 113 no. 3 (April 2013) p. 733-735

complexities of the restrictions placed upon the legislative branch.<sup>123</sup>

Representing the will of the people is not foremost function of the judiciary branch though. As the Supreme Court has affirmed, “Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such ‘responsiveness is key to the very concept of self-governance through elected officials.’ The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must ‘observe the utmost fairness,’ striving to be ‘perfectly and completely independent, with nothing to influence or controul him but God and his conscience.’”<sup>124</sup> More succinctly, the Court writes, “Judges are not politicians, even when they come to the bench by way of the ballot.”<sup>125</sup> Even though judges in the states with judicial elections must be responsive to the viewpoints of the citizenry, representation is still not their foremost duty. It is on this conundrum of purpose, the need to be responsive to majority opinion and yet first and foremost serve as a check against the “tyranny of the majority,” that the unstable foundation of judicial elections is built upon. All the standard controversies associated with money in elections are amplified because it creates the possibility of distracting the judiciary from its primary function as well as weakening majoritarian accountability. This difference between judicial elections and other elections and the need to treat campaign finance regulations differently for judicial elections is recognized by the Court, which ruled “our precedents applying the First Amendment to political elections have little bearing on the

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<sup>123</sup> James Madison, “The House of Representatives, *New York Packet*, 2/8/1788

<sup>124</sup> *Williams-Yulee v. Florida Bar*, S. Ct. 575 U.S. \_\_\_\_ (2015), p. 11

<sup>125</sup> *Id.* p. 1



issues here.”<sup>126</sup>

One of the consequences of the unique role of judicial elections, when compared to the legislative or executive elections, is the need to uphold the public’s confidence in the integrity of the judiciary. As discussed at length in chapter 2, the public’s perception in the judiciary is vital to the ability of the courts to carry out their duty because the judiciary “has no influence over either the sword or the purse; . . . neither force nor will but merely judgment. The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and follow its decisions.”<sup>127</sup> The problem of campaign contributions and judicial elections is exacerbated by this need to preserve a perception of integrity, with the Court having written “the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public’s confidence in the judiciary.”<sup>128</sup> In other words, there does not actually have to be proof of corruption, but merely the perception of corruption in judicial elections to justify regulations aimed at preserving the public’s belief in the integrity of the judiciary.<sup>129</sup> The Court wrote that “This Court’s precedents have recognized the ‘vital state interest’ in safeguarding ‘public confidence in the fairness and integrity of the nation’s elected judges,’” and so to protect this vital state interest states may implement regulations in recognition that judges “charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public

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<sup>126</sup> *Id.* p. 11

<sup>127</sup> *Id.* p. 9-10

<sup>128</sup> *Id.* p. 11

<sup>129</sup> To note, this is not to suggest that this precedent means states can implement sweeping regulations only based on a perception of corruption. Most regulations dealing with judicial campaign finance laws will still have to satisfy strict scrutiny.

confidence in judicial integrity.”<sup>130</sup>

Ultimately, the Court reasoned that “A State’s decision to elect judges does not compel it to compromise public confidence in their integrity. ... [A] State’s interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. ...

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case.”<sup>131</sup> This case especially stands out because it runs counter to the momentum of recent Supreme Court decisions which have generally stuck down campaign finance regulations.

Recognition that regulations surrounding judicial elections should be treated differently than other types of election is not isolated to *William-Yulee*. Additionally, there is the matter of *Hugh Caperton, et al. v. A.T. Massey Coal Company, Inc., et al.* In this case, the Court found that a judge had received such “an extraordinary amount” of campaign contributions from an individual that the judge should have recused himself when that same individual had matter before the court because it violated judicial objective standards that “the probability of actual bias on the part of the judge or decision maker is too high to be

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<sup>130</sup> *Id.*, p. 9

<sup>131</sup> *Id.* p. 4, 5, and 9

constitutionally tolerable.”<sup>132</sup> In its decision, the Supreme Court made note that the contributor had not only made direct donations, but also donated \$2.5 million to a 527 group that supported the judge that would hear the contributor’s appeal. The contributor also spent \$500,000 on independent expenditures. The judge would win that election and then become the deciding vote in the appeal which overturned the previous \$50 million ruling against the contributor. So not only has the court recognized that special regulations are permissible for judicial elections, it has recognized that independent expenditures can impact a judge’s impartiality. If these contributions would have been made to an 501(c)(4) group, the Court would never have known about the contributions and may not have overturned the case in which it ruled the sizeable contributions violated the other party’s due process. As such, it is vital that transparency surrounds money in judicial elections.

Additionally, the Supreme court did not find an example of quid pro quo corruption which is the standard established in *Citizens United v. FEC*. Instead, the Court cited precedent that is was “not required to decide whether in fact [the justice] was influenced.” <sup>133</sup> The Court recognized that “The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively<sup>134</sup> biased, but whether the average judge in his position is ‘likely’ to be neural, or whether there is an unconstitutional ‘potential for bias.’” It found, even though there was absent sufficient evidence of quid pro quo, that “Though not a bribe or

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<sup>132</sup> *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009) p. 1

<sup>133</sup> *Id.* see p. 9

<sup>134</sup> *Id.* see p. 11

criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to [the contributor] for his extraordinary efforts to get him elected.”<sup>135</sup>

The concerns move beyond a mere appearance of impropriety and become reality of a conflict of interest when considering judges may directly preside over a case involving a major donor in an scenario that is not transferable to the legislature where the approval process is spread among numerous individuals. As judges become more reliant on money to maintain their judgeship the importance of maintaining a strong donor base concurrently becomes more important.<sup>136</sup> When judges become reliant upon collecting large campaign contributions that maintain the judge’s own career and economic stability a dangerous conflict of interest is created. Judges must consider potentially impinging their own well-being to preserve the rights of an individual before the bench. As the Supreme Court has ruled previously, “no man can be a judge in his own case, and no man is permitted to try cases where he has an interest in the outcome.”<sup>137</sup> However, because of campaign contributions judges are being requested to do just that.

Judicial elections are not a salient issue for the general population and they may not be highly informed of the issues surrounding a particular race. However, it is not the public’s knowledge of particular judicial candidates or races that is relevant to the issue of money in judicial elections, it is their perception of how money impacts judicial elections that matters. Indeed, in its Caperton ruling the Supreme Court noted in its ruling that “the results of a public opinion poll,

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<sup>135</sup> Id.

<sup>136</sup> Sandra Day O’Connor and Ruth McGregor, “Judicial Selection Principles” 1742-1743

<sup>137</sup> *In Re Murchison*, 349 U.S. 133 (1955)

which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial.”<sup>138</sup>

As previously discussed, a survey of multiple polls indicates that 67% to 90% of the public, depending on the wording of the poll, are concerned that contributions negatively impact court decisions.<sup>139</sup> Judicial elections are often associated with having a number of harmful effects on perceptions of the court. Out of negative ads, judicial position taking and campaign contributions, it is campaign contributions that has the largest negative impact on the public’s perception of the court’s legitimacy.<sup>140</sup> It is when judges are perceived as self-interested in their pursuit of contributions that the public finds it most objectionable and has the biggest negative impact on the public’s perception of the court.<sup>141</sup>

While the survey only examines direct contributions, it is easy to surmise the general public would apply the same thought process to contributions that fund electioneering communications even if the contributions do not go directly to a judicial campaign. The damaging effect money has on the judiciary is evidenced by the fact that individuals in states that elect judges have a lower approval rating of the judiciary than states with other methods of judicial selection.<sup>142</sup> Individuals in states with partisan judicial elections, the type of

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<sup>138</sup> Supra, see note 32 at p. 4

<sup>139</sup> Shira Goodman, “The Danger Inherent the Public Perception that Justice is for Sale” 810

<sup>140</sup> James Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: University of Chicago Press, 2012), 68-69

<sup>141</sup> James Gibson, “Challenges to the Impartiality of State Supreme Courts” 69

<sup>142</sup> Shira Goodman, “The Danger Inherent the Public Perception that Justice is for Sale” 808

judicial selection where the most money is spent, are the most inclined to have an unfavorable view of courts and agree judges are just politicians in robes.<sup>143</sup>

As the judiciary's role is different from that of the legislative and executive branches and that its unique role requires an additional emphasis on neutrality on independence, as well as, the injection of money can have a significantly negative impact on the public's perception of the judiciary even in the absence of proof of corruption, it can be reasonable argued that a different standard should be applied to the regulation of campaign finance laws in state judicial elections. Thus, it being established it would be reasonable to establish a separate legal standard to the campaign finance regulations of judicial elections, it is now prudent to examine the best method for addressing the presence of dark money in state judicial elections.

### **Proposed Reform**

To solve the aforementioned issues and strengthen the judiciaries of the states, it is argued that the following regulation should be pursued and adopted by the states that conduct judicial elections:

- 501 (c)(4)s must create a separate account for any electioneering communications or direct advocacy that they intend to spend on state judicial elections or on issues that are directly relevant to judicial races near the associated spending efforts. If they do indeed make any such independent expenditure, the 501(c)(4) must disclose all contributors of that separated fund.

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<sup>143</sup> Matthew Streb, "Judicial Elections and The Public Perception of the Courts," 158-161

- This disclosure requirement is triggered either by an direct advocacy or electioneering communication expenditure made by the 501(c)(4) or by transferring funds to a 501 or 527 group that has coordinated or made any contributions/expenditures to the relevant race. This is reset every election cycle.
- The establishment of a separate fund is also applicable to independent expenditure only groups that intend to engage in any electioneering communications or direct advocacy. If at any point, the group transfers money to another 527 group they must disclose the name of separated fund's contributors. This is to prevent the obfuscation of donors through shuffling contributions through multiple organizations.
  - In terms of administrative costs, the two funds don't need to be separated if the disclosure requirements are activated only because they transferred funds to an applicable organization. However, if the originating agency makes an independent expenditure, then administrative costs must be separated. This is done to reduce the burden on these groups as there may not be a substantial expense associated with funding disbursements, but the potential activities associated with independent expenditures – see oppo. research, ad buys, production and disbursement of literature – could all amount to a very substantial sum.

It could be argued by those who oppose campaign finance regulations that this proposal is not necessary. It would be noted that there is no quantitative evidence that judicial corruption is a widespread problem and that any regulation

addressing it would create additional restrictions on the democratic process while offering no guaranteed resolution to a problem. However, with dark money the extent of the problem cannot be identified until light is shed upon judicial contributions. Additionally, others may oppose the proposal because it does not go far enough. There is a substantial group that opposes any form of judicial elections and who would argue that any additional regulation would only further legitimize the institution and reduce pressure that exists for a much larger overhaul. However, it should be noted that judicial elections are already deeply entrenched in state institutions and receive widespread popularity making the cessation of judicial elections anywhere highly unlikely.

As any proposed regulation to address dark money in state judicial elections concerns the potential to restrict the free exercise of the first amendment. As such, the regulation must be able to survive the strict scrutiny test during judicial review, which is that the proposed regulation addresses an area of compelling government interest and ameliorates the issue in a matter that is not arbitrary or capricious.

First, it should be noted that the absence of evidence is not the evidence of absence. This is especially relevant as one of the intended outcomes of the proposed regulation would be to ameliorate the issue of insufficient data that is hindering a proper analysis of the extent and influence of money in state judicial elections. Should large donors actually achieve undue influence through contributions to state judicial elections, these donors would have a vested interest in the perpetuation of this framework, and by extension, the obfuscation of any data shedding light onto the nature of said influence. Any argument opposed to



the proposed regulation solely on the basis of there being insufficient data to justify it, when the intent of the regulation is the disclosure of relevant data, is reliant upon the fallacy of argumentum ad ignorantiam. As former Supreme Court Justice Brandeis wrote, “sunshine is the best disinfectant” and so even in the event the proposed regulation reveals an actual absence of evidence and fails to deter any future impropriety, in this worst case scenario, the public’s faith in the efficacy of their state’s judiciary would likely be positively impacted; a critically beneficial outcome at a time of decreasing public faith the judicial branch.

Without quantitative proof of systemic undue influence by, or in favor of, large donors by elected judges, the threshold set in *Citizens United* for the upholding of additional restrictions on campaign finance – which seems to have been set at readily verifiable quid pro quo-style corruption – remains unsatisfied. However, the argument that there is an insufficient basis to implement additional regulations on the exercise of speech in this instance is unfounded as the applicability of the threshold referenced in *Citizens United* is not directly transferable to the relevant proposed regulation. As the Supreme Court has affirmed, case precedent surrounding legislative and executive elections is not relevant due to the different nature of judicial elections when compared to legislative or executive elections.<sup>144</sup> Therefore the quid pro quo threshold of *Citizens United* need not be satisfied.

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<sup>144</sup> *Williams-Yulee v. Florida Bar*, p. 11, see “our precedents applying the First Amendment to political elections have little bearing on the issues here.” And *Williams-Yulee v. Florida Bar*, p. 1, see “States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians.”

However, my proposal must still satisfy strict scrutiny, meaning that because it may negatively impact an individual's ability to exercise his or her First Amendment rights the proposed regulation must have a compelling government interest and the remedy be narrowly tailored. As explored, a judge's role is different from that of the legislative and executive branches.<sup>145</sup> Arising from this institutional difference is the need to preserve the public's faith in the integrity of the judiciary. The Court has recognized safeguarding the public's confidence in the integrity of the nation's elected judges as a "vital state interest," and public perception of judicial integrity is "a state interest of the highest order."<sup>146</sup>

To clarify, the applicability of all the factors in the *Williams-Yulee* matter do not directly translate to my proposal. One of the central premises in the Court's decision is that Yulee directly solicited contributions while running for judicial office, which raised the appearance of impartiality and is what causes the public to question her impartiality.<sup>147</sup> This particular trigger of impropriety is not present in my proposal. Instead, my proposal relies on the Court's findings in *Caperton* that a litigant may have his or her due process violated if a contributor's role in funding a campaign is significant enough so as to invite doubt that the average judge would be able to adjudicate objectively.<sup>148</sup> The Court

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<sup>145</sup> *Id.* p. 2, *see* "A State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections, because a judge's role differs from that of a politician."

<sup>146</sup> *Id.* p. 9, *see* "We have recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'" And p. 2, *see* "Public perception of judicial integrity is accordingly 'a state interest of the highest order.'"

<sup>147</sup> *Id.* p. 5, *see* "In the court's view, 'personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality.'"

<sup>148</sup> *Caperton v. A.T. Massey Coal Co.*, p. 15, *see* "Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances "would offer a

specifically referenced contributions that were made to 527 groups and independent expenditures when totaling the monetary assistance Blankenship, the Massey CEO, spent to help elect his preferred judge.<sup>149</sup> Taken into consideration with dark money, this means that an individual may pour large sums of money into an election without ever having to disclose these efforts to the general public, and so litigants before the court may have their due process violated without ever even knowing about it. This is certainly a prospect that could negatively impact the reputation of the judiciary.

Additionally, the proposed measure would also survive strict scrutiny because of its limited nature thereby satisfying that it is not arbitrary and capricious in scope. This regulation only targets additional disclosure which has been routinely upheld by the court even as the Court has felled huge swaths of other campaign finance regulations. Another benefit of this approach is that disclosure is only triggered if these groups take measures to move into judicial elections where there is a heightened possibility for a conflict of interest, or appearance thereof. So it's not a standing burden on free speech, it is only activated when these groups move into a realm where the government has a compelling interest to more intently regulate which should satisfy the compelling public interest and narrowly tailored requirement of strict scrutiny.

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possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."

<sup>149</sup> *Caperton v. A.T. Massey Coal Co.*, p. 2, see "In addition to contributing the \$1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost \$2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U. S. C. §527. The §527 organization opposed McGraw and supported Benjamin. Blankenship's donations accounted for more than two-thirds of the total funds it raised. *Id.*, at 150a. This was not all. Blankenship spent, in addition, just over \$500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—"to support . . . Brent Benjamin."

It is understood that this paper has not conclusively proven the corrupting influence of money in the judiciary nor that money is causing adjudication in a manner that is discordant with a judge's constituency. As discussed at the inception of this paper, it was that very inability to obtain comprehensive data to study these questions that fostered this inquiry. Further, as the proof of an improperly motivated adjudication often only exists in the mind of the presiding judge, conclusive proof of the negative influence of campaign contributions on judicial behavior can be extremely difficult to obtain, a conclusion acknowledged by the Supreme Court as well.<sup>150</sup>

In recognition of this lack of conclusive proof, it is noted that the Supreme Court does not mandate actual proof of corruption to find a litigant has been deprived of his or her due process.<sup>151</sup> Additionally, the Supreme Court does not mandate actual proof of corruption to justify further regulation of judicial elections, instead requiring only that the regulation narrowly targets an issue that has a negative impact on the public's perception of the judiciary's credibility.<sup>152</sup> Even absent definitive proof, sufficient evidence when viewed against the potential fallout from falling to act, or acting unnecessarily, can warrant an appropriately measured response. My proposed reform is reflective of this lack of a definitive conclusion. It is not a sweeping overhaul but merely a call for greater disclosure in very specific circumstances. In fact, it is the aim of this reform to

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<sup>150</sup> *Id.* p. 15, *see* "Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion."

<sup>151</sup> *Supra*, *see note 148*

<sup>152</sup> *Supra*, *see notes 145 - 146*

help provide the public and policymakers with the tools to help obtain definitive proof one way or the other.

## Conclusion

In the matter of *Varnum v. Brien*, the state supreme court justices in Iowa performed what they belied to be the duty of the judiciary and ensured the equality of a minority group even though the court's ruling stood in contrast to their constituents' opinion.<sup>153</sup> By ruling in favor of equality for the gay community, the Iowa Supreme Court opened itself up to a national firestorm and every Iowa Supreme Court justice that was up for a retention election the next year was voted out of office by the electorate. Several years later, in a decision vindicating the Iowa Supreme Court justices, the United States Supreme Court, notably not subject to judicial elections, made a similar ruling thereby legalizing marriage for gay couples throughout the U.S.<sup>154</sup>

These two outcomes wonderfully represent the divergence of the role of courts when elections are introduced. The controversy surrounding the merits of judicial elections has been long standing and written about at length in academia. However, in the last decade there has been an explosion of money in state judicial elections and in the last five years dark money has also increased in prominence in state judicial elections.

The landscape has shifted but the arguments have not. While the controversy surrounding judicial elections remains the ability to verify the integrity of judicial elections is now absent. Dark money prevents the citizenry from measuring what impact campaign contributions are having on judicial

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<sup>153</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)

<sup>154</sup> *Obergefell Et Al. v. Hodges, Director, Ohio Department Of Health, Et Al.*, 576 U.S. \_\_\_\_\_, (2015)

adjudication. If proponents of judicial elections wish to continue to cite the majoritarian benefit when advocating for state judicial elections, they must also be able to offer the ability to verify that extra-constituent donors have not nullified that benefit and have incentivized elected judges from ruling in a manner that is not reflective of their constituents. That is why proponents and opponents of judicial elections should both equally support additional campaign finance disclosure regulations regarding contributions that can benefit a judicial candidate. The policy proposal contained here within does not resolve all of the issues, but it does strive to provide policy makers with the information to make informed decisions and to determine whether the main justification for the continuation of judicial elections is even a true assertion.

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